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No. 94-68

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; JEFFREY B. PINE, in his capacity as Attorney General of the State of Rhode Island; TOWN OF CHARLESTOWN; ROBERT J. SCHIEDLER, CHARLES W. BECK, CHARLENE Q. DUNN, FORRESTER C. SAFFORD, and J. MICHAEL DOWNEY, in their capacity as Members of the Charlestown Town Council,

Petitioners

v.

NARRAGANSETT INDIAN TRIBE, GEORGE H. HOPKINS, in his capacity as Chief Sachem, and ANTHONY DEAN STANTON, in his capacity as First Councilman,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND OVERVIEW	1
COUNTERSTATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE FIRST CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENTS CONSTRUING LEGISLATIVE HISTORY IN DECIDING THAT THE NARRAGANSETT TRIBE IS NOT EXCLUDED FROM IGRA	5
II. THE FIRST CIRCUIT DID NOT MISAPPLY CANONS OF STATUTORY CONSTRUCTION PERTAINING TO "REPEALS BY IMPLICATION"	10
III. THERE ARE NO RELEVANT CONSTITUTIONAL QUESTIONS RAISED BY PETITIONERS	15
CONCLUSION	18
APPENDICES:	
A. Statutory Excerpts from Indian Gaming Regulatory Act not included in Appendix "E" to Petition	1a
B. Portions of Senate Report 100-446 not included in Appendix "F" to Petition	3a
C. Portions of the Congressional Record Relating to Legislative History to the Indian Gaming Regulatory Act not included in Appendix "G" to Petition	4a

TABLE OF AUTHORITIES

CASES — Page

Bowen v. Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 16
Brader v. James, 246 U.S. 88 (1918) 18
Brock v. Pierce County, 476 U.S. 253 (1986) 8
Caminetti v. United States, 242 U.S. 470 (1917) 8
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 25 (1831) 15
Connecticut Mutual Life Insurance Co. v. Spratley, 172 U.S. 602 (1899) 17
Connecticut National Bank v. Germain, 112 S.Ct. 1146 (1992) 10
County of Yakima v. Yakima Indian Nation, 112 S.Ct. 683 (1992) 10, 11
Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) 12
Grove City College v. Bell, 465 U.S. 555 (1984) 8
Haggar Co. v. Helvering, 308 U.S. 389 (1940) 12
Home Building & Loan Assn. v. Blaisdell, 209 U.S. 398 (1934) 18
Joplin v. Southwest Missouri Light Co., 191 U.S. 150 (1903) 17
Lynch v. United States, 292 U.S. 571 (1934) 16
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 17-18
Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 10, 12, 18
Morton v. Mancari, 417 U.S. 535 (1974) ..... *passim*
National Railroad Passenger Corp. v. Atchison, T. & S.F.R. Co., 470 U.S. 451 (1985) 16
Natural Resources Defense Council v. U.S.E.P.A., 824 F.2d 1258 (1st Cir. 1987) 12
O'Neale v. Thornton, 6 Cranch 53 (1810) 10
Perry v. United States, 294 U.S. 330 (1935) 16
Reichelderfer v. Quinn, 287 U.S. 315 (1932) 17
Rubin v. United States, 449 U.S. 424 (1981) 10
Russello v. United States, 464 U.S. 16 (1983) 7
Sierra Club v. Froehlke, 816 F.2d 205 (5th Cir. 1987) 17

TABLE OF AUTHORITIES—Continued

Page

St. Martin v. Evangelical Lutheran Church, 451 U.S. 772 (1991) 11, 15
State of R.I. v. Narragansett Tribe, 19 F.3d 685 (1st Cir. 1994) ..... *passim*
State of Rhode Island v. Narragansett Tribe, 816 F. Supp. 796 (D.R.I. 1993) 9
Tiger v. Western Investment Co., 221 U.S. 286 (1911) 18
United States v. Goldenberg, 168 U.S. 95 (1897) 10
United States v. John, 437 U.S. 634 (1978) 18
United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 8, 10
United States v. Sisseton-Wahpeton Sioux, 897 F.2d 358 (8th Cir. 1990) 7
United States v. Tynen, 78 U.S. (11 Wall.) 88 (1871) 12
United States v. Wright, 53 F.2d 300 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932) 18
Veix v. Sixth Ward Building & Loan Assn. of Newark, 310 U.S. 32 (1940) 18
Watt v. Alaska, 451 U.S. 259 (1981) 4, 11, 12, 14
Weinberger v. Rossi, 456 U.S. 25 (1982) 8
West Virginia University Hospitals, Inc. v. Casey, 111 S.Ct. 1138 (1991) 8
Worcester v. Georgia, 31 U.S. 313 (1832) 15

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 8, cl. 3 ..... 15, 17
U.S. Const. Art. I, § 10, cl. 3 15

FEDERAL STATUTES

Indian Gaming Regulatory Act (1988), 25 U.S.C. §§ 2701 *et seq.* ..... *passim*
Rhode Island Indian Claims Settlement Act (1978), 25 U.S.C. §§ 1701 *et seq.* ..... *passim*

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

Page

134 Cong. Rec. S 12649 (daily ed. Sept. 15, 1988) .. 7
S. Rep. No. 446, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 .....6, 8, 9, 10
2B J. Norman Singer, *Sutherland on Statutes and Statutory Construction*, § 51.02 (5th ed. 1992) 12
Providence Journal, July 22, 1994 3

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BRIEF IN OPPOSITION

INTRODUCTION AND OVERVIEW

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. It provided that any tribe which meets the definition of "Indian Tribe" and which owns land over which it possesses "governmental power" is entitled to the benefits of IGRA. The Narragansett Tribe concededly meets IGRA's eligibility requirements. Therefore it follows that it is entitled to the benefits of IGRA, which means essentially

that it can offer certain forms of gaming to the public and earn revenues therefrom, as hundreds of other tribes are doing under IGRA.

But Petitioners argued below that an earlier statute passed in 1978—the Rhode Island Claims Settlement Act (RIICSA), 25 U.S.C. §§ 1701 et seq.—excludes the Tribe from IGRA. Petitioners claimed that this argument is supported in a colloquy between three senators when IGRA was going through the Senate in 1988. However, nothing in IGRA itself supports that argument, and indeed, the Senate voted to remove a clause from the bill that *would* have excluded the Narragansetts.

Consequently, the United States District Court for Rhode Island, and the Court of Appeals for the First Circuit, both found that the face of IGRA took precedence over a floor colloquy. Petitioners ask this Court to accept the case for review and overrule the courts below. Aside from being a question of interest only in Rhode Island (and arguably in Maine and Massachusetts, which have somewhat similar settlement acts), this question is uniquely amenable to Congressional review. As the dissent below suggests, if Congress does not agree with the decisions of the courts below, it can always amend IGRA to restore the explicit language that the Senate deleted from IGRA.

That is precisely what the Rhode Island Senators (and Governor) urged Congress to do at a hearing on May 17, 1994, before the Senate Committee on Indian Affairs. However, the bill thereafter introduced by the Committee, S. 2230 (103d Congress), did not do as the Rhode Island delegation had urged. Instead, it was silent on the point, and the Committee Chairman, Senator Inouye (who had been one of the colloquists in 1988), urged that the State and Tribe try to work out their differences by agreement. On July 21, Governor Sundlun met with the Tribe, and announced to the press that he has agreed to talks "that will frame the terms under which the Tribe will build a

casino in Rhode Island." Providence Journal, July 22, 1994, front page.[1]

It thus seems that the question is not one of national importance that this Court should review. Petitioners have cited no important principle that needs declaration or modification, nor any disagreement among circuits. This case is sui generis. In any event, the question was correctly decided by the lower courts. And, we might add, there are strong indications that the question may soon be mooted by agreement between the Tribe and the Governor.

COUNTERSTATEMENT OF FACTS

We have no material quarrel with Petitioners' statement of facts (Pet. at 4-10), with one exception. Petitioners describe the circumstances of the agreement that led to section 1708 of the Rhode Island Indian Claims Settlement Act—the section that the Court of Appeals held gave the State concurrent jurisdiction over the settlement lands. Petitioners use these circumstances to argue that as of September 1988, Rhode Island's claimed jurisdiction over the settlement lands had been "agreed upon by the parties as a term of their settlement." Pet. at 8.

The Tribe agreed to no such thing. The State jurisdiction that the Tribe agreed to in the settlement was in the context of the Tribe's then-status as a non-recognized Indian tribe, with no sovereignty or jurisdiction of its own that was recognized by either Rhode Island or the United States. The Tribe *never* agreed that when and if it should ever become a recognized sovereign tribe with government powers of its own (as in fact happened in 1983), lands held by the Tribe would remain subject to State jurisdiction. Arguably section 1708 does not differentiate between the Tribe's pre-sovereign status and

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[1] Press reports out of Massachusetts indicate that Governor Weld and The Gay Head Wampanoag Tribe are near agreement on a casino to be located in New Bedford. This represents a switch in that State's position too.

its post-sovereign status, but if it applies to post-sovereign status at all, which the Tribe denies, it cannot be said that the Tribe *agreed* to it.

SUMMARY OF ARGUMENT

I. Petitioners argue that the Court of Appeals disregarded critical legislative history that controls the case. That is not so. The history in question is a colloquy between three Senators, which Petitioners would use to exclude the Narragansetts from an Act which on its face does not exclude them. Moreover, the original bill *had* a clause excluding the Tribe, but the Senate deleted it before the bill was passed.

Petitioners cite no conflict of courts, nor any principle at stake requiring declaration or modification by this Court.

II. Petitioners argue that the Court of Appeals disregarded canons of statutory construction when it held that portions of the RIICSA were impliedly repealed by IGRA, *citing Morton v. Mancari*, 417 U.S. 535 (1974), and *Watt v. Alaska*, 451 U.S. 259 (1981).

In *Morton* the question was whether the Equal Employment Opportunity Act of 1972, a general act prohibiting racial discrimination in federal employment repealed an earlier Act requiring BIA job preference for Indians. This Court said the two statutes were not in irreconcilable conflict, and therefore there was no implied repeal. Likewise in *Watt* the Court found two arguably inconsistent statutes not to be in fact inconsistent, so the later did not repeal the earlier.

The circumstances in both cases were complex and unique. They furnish no guidance here, and much less are they in any way inconsistent with the decision of the Court of Appeals. Nor have Petitioners cited any principle at stake requiring declaration or modification by this Court.

III. Petitioners attempt to implicate the Compact and Contract clauses of the Constitution. Those clauses have no relevance to this case nor were they raised below.

ARGUMENT

I. THE FIRST CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENTS CONSTRUING LEGISLATIVE HISTORY IN DECIDING THAT THE NARRAGANSETT TRIBE IS NOT EXCLUDED FROM IGRA.

Congress enacted IGRA "to provide a statutory basis for the operation of gaming *by Indian tribes* as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1) (emphasis added).[2] It found the Act to be in furtherance of "a principal goal of Federal Indian policy . . . to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). The Act declares that "*Indian tribes* have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5) (emphasis added). Congress defined "Indian Tribe" to mean:

> "[*A*]*ny* Indian tribe, band, nation, or other organized group or community of Indians which—
>
> "(A) is recognized as eligible by the Secretary [of the Interior] for the special programs and services provided by the United States to Indians because of their status as Indians, and
>
> "(B) is recognized as possessing power of self-government."

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[2] This and other relevant sections of IGRA, which were not appended to the Petition, are set forth in Appendix A hereto.

25 U.S.C. § 2703(5) (emphasis added).[3] Under the unambiguous language of the Act, there is no special exclusion of the Narragansett Tribe or the State of Rhode Island from this sweeping federal Indian legislation.[4]

Petitioners urge that under this Court's precedents it is proper, indeed necessary, to reject this language, and to imply a specific exclusion of the Narragansett Tribe from the sweep of this legislation. They do not start with the textual language. Instead, they jump to an assertion that because section 1708 of the RIICSA existed at the time of IGRA's enactment and conflicts with IGRA's grant of jurisdiction over certain gaming activities to the Tribe, Congress could not have intended to displace it.

Petitioners' position might have merit if it were supported by the statutory text, *as it was in an earlier version of the bill that was to become IGRA*. A section of the bill, deleted before enactment, would have expressly excluded the Narragansetts from the Act:

> "23. Nothing in this Act may be construed as permitting gaming activities, except to the extent permitted under the laws of the State of Rhode Island, on lands acquired by the Narragansett Indian Tribe under the Rhode Island Indian Claims Settlement

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[3] As set forth in their definition of the "Questions Presented for Review," Petitioners do not seek review of the First Circuit's holding that the Narragansett Tribe falls within IGRA's definition of "Indian Tribe" or that it possesses "governmental power" over its land, which are the only other eligibility criteria. 25 U.S.C. § 2703(4). Their Petition is limited, instead, to the First Circuit's rejection of their arguments that Congress intended to exclude the Narragansett Tribe from the Act altogether.

[4] Consistent with the text, the Senate Committee Report for the bill that was to become IGRA states that the Act "is intended to expressly preempt the field in governance of gaming activities on Indian lands." S. Rep. No. 466, 100th Cong., 2d Sess. 6, *reprinted in* 1988 U.S.C.C.A.N. 3076. This and other relevant portions of the Senate Report, which were not appended to the Petition, are set forth in Appendix B hereto.

> Act or on any lands held by, or on behalf of, such Tribe."

134 Cong. Rec. S 12649 (daily ed. Sept. 15, 1988).[5] But the very deletion of that provision by vote of the Senate gives rise to a long-standing canon of construction, applicable to the text as enacted: when Congress deletes limiting language from a provision before enactment, it must be presumed that Congress intended the provision to operate without the limitations so deleted. *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *accord, United States v. Sisseton-Wahpeton Sioux*, 897 F.2d 358, 362 n.8 (8th Cir. 1990).

To ignore this presumption would engage the courts in dangerous speculations as to what deals are and are not struck in the game of politics that ultimately results in the language of a statute. It can hardly be said that the First Circuit's employment of that presumption works a misapplication of the precedents of this Court. Under that presumption the court examined the Narragansett exclusion which was deleted from the bill; the Senate report which accompanied the bill at a time when the deleted clause was still in the bill; and the related colloquy on the floor, and concluded that such legislative history could not change the express language ultimately enacted by Congress. *State of R.I. v. Narragansett Tribe*, 19 F.3d 685, 700 (1st Cir. 1994). Petition Appendix (Pet. App.) at 32. Far from being discordant with the decisions of this Court, it is in perfect harmony with them.

The Court of Appeals also rejected Petitioners' attempt to elevate the significance of the subject colloquy[6] in accordance with this Court's precedents, which "do not permit [the unambiguous text] to be expanded or con-

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[5] This portion and introductory portions of the Congressional Record, which were not appended to the Petition, are set forth in Appendix C hereto.

[6] Set forth in Petition Appendix at 102-03.

tracted by the statements of individual legislators or committees during the course of the enactment process." *West Virginia University Hospitals, Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1991) (*citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *Caminetti v. United States*, 242 U.S. 470, 485 (1917)); *accord e.g., Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) ("The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."). Such statements may provide evidence of legislative intent only when they are consistent with statutory language and other legislative history.[7] *See, e.g., Brock v. Pierce County*, 476 U.S. 253, 263 (1986); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984). That is not the case here.[8] Thus, the First Circuit properly gave

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[7] Otherwise, the court is left to inconclusive speculations. Indeed, it was believed at the time by some that Senator Pell was withdrawing his Narragansett exclusion clause because Congressman Udall, the Chairman of the House Interior Committee, had let it be known that a provision expressly singling out an Indian tribe for exclusion from general legislation benefiting Indian tribes would not be accepted in the House. This seems much more plausible than that the withdrawal was "in the interests of clarity" as the colloquy suggested. The First Circuit properly characterized the colloquy as anything but clarifying and provided its own plausible explanation for the withdrawal of the Narragansett exclusion. *See* 19 F.3d at 698 n.14; 700 n.16.

[8] Indeed, other pieces of legislative history run contrary to the congressional intent lobbied by Petitioners. The Senate Committee Report states that IGRA *"is intended to expressly preempt the field in the governance of gaming activities on Indian lands."* S. Rep. No. 446, 100th Cong., 2d Sess. 6, *reprinted in* 1988 U.S.C.C.A.N. 3076 (emphasis added). It also provides that "[t]he Committee . . . trusts that courts will interpret any ambiguities on these issues in a manner that will be *most favorable to tribal interests* consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." *Id.* at 15. The first statement is perfectly consistent with the sweeping language of the text of the Act: IGRA covers the field of Indian gaming pursuant to Congress's plenary power over such matters. The second is consistent with federal common law, and nothing in the text of the Act

precedence to the text of the IGRA over the colloquy of three Senators without departure from the applicable decisions of this Court.

The same is true of its treatment of selected language from the Senate Committee report relied upon by Petitioners.[9] As the District Court concluded and the First Circuit affirmed, "[P]etitioners are asking this court to interpret the Senate report as carrying the force of law where there is no textual support for their position." *State of Rhode Island v. Narragansett Tribe*, 816 F. Supp. 796, 803 (D.R.I. 1993), *aff'd*, 19 F.3d at 700. The timing of that language in relation to the deletion of Rhode Island's special exemption from the Act renders it valueless as evidence of congressional intent:

> "The Senate report speaks only to the bill *as reported out of committee*; it was composed *before* the deletion of the Special Rhode Island exemption provision,

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suggests that Congress expected it to be construed in derogation of that standard.

Also, the Senate Committee Report for IGRA provided:

> "There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. S. 555 bars any tribe within those States, as a matter of Federal law, from operating bingo or any other type of gaming. *In the other 45 States, some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill.*"

Id. at 11-12 (emphasis added). Pet. App. at 99-100. This is consistent with the First Circuit's view that exclusive regulation of class I and II gaming passed to the Narragansett Tribe under IGRA. Non-exclusive regulation of class III gaming, fairly consistent with the RIICSA, became governed by the dual tribal-state regulation under IGRA. *See also* App. B, setting forth other relevant and consistent legislative history.

[9] Set forth in Pet. App. at 100-01.

> former section 23, from the final version of the bill during floor debate. Thus, the quoted statement sheds no light on Congress's intent regarding the law it actually enacted."

State of R.I. v. Narragansett Tribe, 19 F.3d at 700 (emphasis original). Pet. App. at 32. Again, this logic is in no sense a departure from the precedents of this Court.

II. THE FIRST CIRCUIT DID NOT MISAPPLY CANONS OF STATUTORY CONSTRUCTION PERTAINING TO "REPEALS BY IMPLICATION."

> "[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, *e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-242 . . . (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 . . . (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 . . . (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981); see also *Ron Pair Enterprises, supra*, 489 U.S., at 241, 109 S.Ct. at 1030."

Connecticut Nat. Bank v. Germain, 112 S.Ct. 1146, 1149 (1992). Furthermore, "the State fails to appreciate . . . that the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). "[T]he canons of construction applicable in Indian law are deeply rooted in the unique trust relationship between the United States and the Indians." *Id.* (quotations and citations omitted). One cardinal principle is that "statutes are to be construed liberally in favor of the Indians." *Id.* (citations omitted). *Accord, County of*

Yakima v. Yakima Indian Nation, 112 S.Ct. 683, 693 (1992) (describing this as "a principle deeply rooted in this Court's Indian jurisprudence").

The First Circuit, emphasizing the importance of the statutory text, faithfully abided by the decisions of this Court in applying traditional canons of statutory construction. But even if it strayed from those standard rules of thumb, as the lone dissenter on that Court suggested, its decision is fully compatible with the canons of construction applied in the Indian law context.

Having concluded that IGRA applied to the Narragansett Tribe, the First Circuit confronted the conflict between that applicability and section 1708 of RIICSA, which it held gave Rhode Island non-exclusive civil regulatory jurisdiction over the Tribe's land. *Id.* at 696, 702. Petitioners seize upon this conflict, attempting to turn the doctrine that "implied repeals are disfavored" to their favor: they ask that Congress's failure to explicitly exclude the Narragansetts be ignored and that the Tribe be excluded from IGRA under what amounts to the reverse of the same implied repeal doctrine that the court held favored the Narragansetts. They exclaim that the First Circuit "failed to comply with this Court's repeated holdings regarding repeals by implication." Petitioners are wrong.

It is not enough for Petitioners to assign error to the Court of Appeals by citing the litany of cases stating the obvious: that "repeals by implication are not favored." *See* Petition at 15-20 (citing, e.g., *Morton v. Mancari,* 417 U.S. 535 (1974); *Watt v. Alaska,* 451 U.S. 259 (1981); *St. Martin Evangelical Lutheran Church v. South Dakota,* 451 U.S. 772 (1981)). That rule has other inseverable facets that come into play in this case.

First, where feasible, courts will strive to give effect to both arguably conflicting statutes so as to preserve the sense and purpose of both. *See Watt v. Alaska,* 451 U.S.

at 267 (citing *Morton v. Mancari*, 417 U.S. at 551; *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940)). Second, when earlier and later statutes are irreconcilable, courts may have no choice but to find that one repeals the other by implication. *See Morton v. Mancari*, 417 U.S. at 550 (*citing Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945)); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871); *Natural Resources Defense Council v. U.S.E.P.A.*, 824 F.2d 1258, 1278-79 (1st Cir. 1987). Third, "if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Tynen*, 78 U.S. (11 Wall.) at 92. *See also* 2B Norman J. Singer, *Sutherland on Stat. Const.* § 51.02 (5th ed. 1992) (more recent of two irreconcilable statutes governs). Finally, in all of this, the "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766. The First Circuit did not depart from these standards.

Petitioners have to concede that the Court of Appeals correctly found an irreconcilable conflict between section 1708 of RIICSA, which the court held gave Rhode Island jurisdiction over all Narragansett activity, including gaming, and IGRA's sweeping governance of all Indian gaming. But Petitioners suggest that the *earlier* in time must be the "winner" and the later the "loser" under their application of the rules surrounding "implied repeals." As the First Circuit correctly decided, however, the legislative history on which Petitioners bank is inconsistent with the face of IGRA (which declares that tribes who meet the eligibility criteria, as the Narragansetts do, are entitled to the benefits of the Act) and inconclusive on its own.

We note too that the Tribe's eligibility for IGRA, which displaces only a small part of Rhode Island's concurrent jurisdiction over the Tribe's land, would not thwart section 1708 of RIICSA nearly as much as elimination of

the Tribe entirely from IGRA would thwart Congress's purpose to have IGRA govern the entire field of Indian gaming (sections 2701-2702 of IGRA). *See State of R.I. v. Narragansett Tribe,* 19 F.3d at 704-05. Pet. App. at 42-43.

It is instructive that one of the leading cases for this Court's articulation of the canons surrounding "implied repeals" is an Indian case, *Morton v. Mancari,* 417 U.S. 535 (1974).

In *Mancari,* this Court rejected arguments that the enactment of Title VII's prohibition against race discrimination in federal employment caused a repeal of federal "Indian hiring preferences" within the Bureau of Indian Affairs. Those preferences, the Court pointed out, were part of longstanding federal policies to strengthen tribal self-goverment, both politically and economically. *Id.* at 542-43. The Court went on to describe such preferences as part of Congress's constitutional duty to legislate on behalf of the Indian tribes—"to do all that is required to . . . prepare the Indians to take their place as independent, qualified members of the modern body politic." *Id.* at 552 (citations and quotations omitted).

These very considerations support deference to Congress's intent to preempt the field of Indian gaming through IGRA in furtherance of its long-standing trust duty to promote tribal self-sufficiency and economic development. To ignore that express intent and to imply, without textual support or qualified legislative history, an exclusion for the Narragansetts, would place the Court in interference with Congress's purpose to enact broad legislation for the benefit of all tribes.

In short, the primary lesson to be drawn from *Mancari* for this case is that courts must be extremely leery of thwarting the clear expressions of Congress in the field of federal Indian policy. The First Circuit's decision is consistent with that teaching. Petitioners extrapolate

from the mere fact of this Court's rejection of an implied repeal in *Mancari* and other cases, that it must do the same here. *See* Petition at 15-18. This is a narrow, simplistic, and unworkable view of the case law.[10]

With due respect to the dissenting opinion in the Court of Appeals, *Watt v. Alaska*, 451 U.S. 259 (1981), which on the circumstances present in *Watt* applied the rules set forth in *Mancari*, does not command a different result. The arguably conflicting provisions at issue in *Watt* were found not to be truly in conflict. Hence, the usual rule was followed that where there is no irreconcilable conflict, there is no implied repeal. Whether two statutes are in conflict usually depends on a variety of surrounding circumstances. It is simply not credible to say that the circumstances present in *Watt* give any useful guidance whatever in our case as to whether RIICSA and IGRA are in conflict.

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[10] In *Mancari*, for instance, the Court considered numerous factors indicating Congress's obvious intent to retain the former statute. Congress had exempted from Title VII the "Indian hiring preferences" for tribal and reservation-related private employers. The Court refused to attribute to Congress the "irrationality and arbitrariness" of a repeal by implication of similar preferences for BIA employment simply because it did not include a specific exemption in that regard upon expanding Title VII to the federal government. 417 U.S. at 548. It also pointed out that it was "improbable, to say the least" that within 3 months of the subject expansion of Title VII, Congress would expand "Indian hiring preferences" in other federal programs if its intent in the former was to repeal those within the BIA. *Id.* at 548-49. It is these factors that made *Mancari* "a prototypical case where an adjudication of repeal by implication [was] not appropriate." *Id.* at 550. It was obvious that Title VII was "designed to deal with an entirely different and, indeed opposite problem" than the BIA hiring preferences. *Id.* "Any perceived conflict is thus more apparent than real." *Id.* There are no similar factors involved in this case. The conflict is narrow, but real and the resolution most consistent with the expression of congressional intent is preservation of IGRA as an Act that governs the field.

III. THERE ARE NO RELEVANT CONSTITUTIONAL QUESTIONS RAISED BY PETITIONERS.

In a last ditch effort to persuade this Court that the First Circuit misapplied applicable precedent, Petitioners make the novel argument—not raised to the courts below—that there may be "Compact Clause" dimensions to their problem.[11] They conveniently rely upon *St. Martin v. Evangelical Lutheran Church*, 451 U.S. 772 (1981) to suggest that this must change to their advantage the formula for application of rules surrounding implied repeals. *See* Petition at 20-23.

The Compact Clause is irrelevant on its face. It refers to compacts by States with other States or with foreign powers. An Indian tribe is neither. The Constitution reserves to Congress full plenary authority over matters affecting the Tribes. U.S. Const. Art. I, § 8, cl. 3. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."). The status of the tribes in relation to the states and the federal government is unique; it cannot be construed similarly to that of foreign nations. *See, e.g., Worcester v. Georgia*, 31 U.S. 313, 323-24 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 25, 31 (1831). The "Compact Clause" has no application here.

Petitioners apparently argue that section 1708 of RIICSA must be treated the same as a debt or obligation of the United States of America and, from there, suggest

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[11] Petitioners cite to "U.S. Const. Art. I, § 10, cl. 8." Petitioners' Brief at 21. There is no eighth clause to Article I, section 10. Presumably, Petitioners meant to cite clause 3, which provides:

> "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless invaded, or in such imminent Danger as will not admit of delay."

that application of IGRA to the Narragansett Tribe would be a breach of that obligation, prohibited by the "Contract Clause." Petition at 20-23.

If that is their argument, it too fails. First, section 1708's grant of non-exclusive jurisdiction to Rhode Island over the Tribe's land is not an enforceable contract. *See National Railroad Passenger Corporation v. Atchinson, T. & S. F. R. Co.*, 470 U.S. 451, 465-70 (1985) (presumption is that legislation declares a policy and does not create vested rights "absent some clear indication that the legislature intends to bind itself contractually"). The cases relied upon by Petitioners involved explicit debts or obligations of the United States. *See Perry v. United States*, 294 U.S. 330 (1935) (bond issued on credit of United States; Constitution gives Congress power to so borrow, but not to repudiate the obligation); *Lynch v. United States*, 292 U.S. 571 (1934) (life insurance obligation under War Risk Insurance Act of 1917 with monthly premiums paid by insured).

Application of IGRA to the Narragansett Tribe in partial repeal of section 1708 is not analogous to the repudiation of government obligations. There have been no "fruits actually reduced to possession of contracts lawfuly made"; if RIICSA allocates concurrent jurisdiction to the State in section 1708, that "constitutes neither a debt of the United States, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a premium." *See Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) (distinguishing cases finding United States in breach of contractual obligations) (citations omitted).[12]

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[12] We take issue with Petitioners' assertion of these arguments on both procedural and factual grounds. If Petitioners are to lay blame against the United States in this manner, they should be obliged to name it or the appropriate officers as parties to this action. We also deny Petitioners' assertion that section 1708 is tantamount to a bargained-for contract, see Counterstatement of Facts, pp. 3-4 above.

More importantly, Petitioners' speculative "constitutional questions" have no place in this case. Congress's plenary power over Indian matters is, itself, established by the Constitution. *See* U.S. Const. Art. I, § 8, cl. 3. As stated in *Mancari*, this gives rise to a "special relationship":

> "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

417 U.S. at 552 (quotations and citations omitted). Congress enacted IGRA in "proper fulfillment of its trust" to all tribes. The exclusion of the Tribe by implication from a Congressionally authorized source of revenue would jeopardize that trust. *See id.* at 552-53.

Indeed, Petitioners ignore the principle that there is a presumption against implying into the construction of section 1708 a limitation upon this plenary power of Congress. *See Joplin v. Southwest Missouri Light Co.*, 191 U.S. 150, 157 (1903) (presumption against contracting away governmental powers). Congress certainly remains free to modify prior legislative schemes under the fundamental rule that one Congress may not bind a subsequent Congress. *See Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932); *Connecticut Mutual Life Insurance Co. v. Spratley*, 172 U.S. 602, 621 (1899); *Sierra Club v. Froehlke*, 816 F.2d 205, 215 (5th Cir. 1987).[13] And

[13] This holds true even if section 1708's grant of nonexclusive jurisdiction to Rhode Island were construed as some sort of contractual arrangement. *See Merrion v. Jicarilla Apache Tribe*, 455

this rule has particular force in the realm of legislation pertaining to the tribes. In exercising its plenary authority in this area, Congress may act through general legislation or through legislation specific to a particular tribe to regulate tribal activities previously subject to state authority. *See, e.g., Montana v. Blackfeet Tribe of Indians* 471 U.S. at 765-67; *United States v. John*, 437 U.S. 634, 649-53 (1978); *Brader v. James*, 246 U.S. 88, 95-97 (1918); *Tiger v. Western Investment Co.*, 221 U.S. 286, 310-17 (1911); *United States v. Wright*, 53 F.2d 300, 305-08 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932).

In sum, there is no merit to Petitioners' attempt to insert constitutional concerns into the application of canons pertaining to "implied repeals." The First Circuit's decision is in keeping with the decisions of this Court.

CONCLUSION

The decision of the United States Court of Appeal for the First Circuit is fully consistent with the decisions of this Court and presents no important, undecided question of federal law. The Petition for Certiorari should be denied.

Respectfully submitted,

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U.S. 130, 147-48 (1982) (*citing Veix v. Sixth Ward Building & Loan Assn. of Newark*, 310 U.S. 32 (1940); *Home Building & Loan Assn. v. Blaisdell*, 209 U.S. 398 (1934)).